

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

FILE

OFFICE OF  
MANAGING DIRECTOR

March 10, 2005

Ruth Milkman  
Stephen J. Berman  
Lawler, Metzger & Milkman, LLC  
2001 K Street, N.W.  
Suite 802  
Washington, D.C. 20006

Re: Request for Refund/Waiver of Application Fees  
Access 220, LLC and Access Spectrum, LLC  
Fee Control No. 00000RROG-05-023

Dear Counsel:

This is in response to your request (dated September 28, 2004) for refund of application fees filed on behalf of Access 220, LLC and Access Spectrum, LLC (collectively, Access Spectrum). Specifically, you request that the Commission refund the application fees associated with 115 Phase II economic area (EA) and Phase II regional economic area grouping (REAG) license modification applications, for a total refund of \$41,975.00.

You recite that "Access Spectrum is seeking [a] . . . new regulatory construct for its 220 MHz licenses[.]"<sup>1</sup> You state that in order to obtain this comprehensive regulatory relief, Access Spectrum has submitted 123 license applications, all of which are "supported by a single document that explains the basis for the regulatory changes requested." You state that Access Spectrum submitted: (1) applications for renewal of two Phase I Nationwide licenses, with each including a request for waiver of a Commission rule; (2) applications for modification of two Phase I Nationwide licenses, with each including a request for waiver of two Commission rules; (3) notifications of compliance with ten-year construction milestone for two Phase I Nationwide licenses, with each including a request for waiver of a Commission rule; (4) an application for modification of one Phase II Nationwide license, including a request for waiver of two Commission rules; and (5) applications for modification of 106 Phase II economic area (EA) licenses and 10 Phase II regional economic area grouping (REAG) licenses (Phase II EA/REAG applications), with each including a request for waiver of two Commission rules.

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<sup>1</sup> You state that Access Spectrum is requesting a uniform renewal deadline of September 19, 2019 for all of its 220 MHz licenses, annual reporting for these licenses, and a requirement that Access Spectrum satisfy the Commission's substantial service test at the September 19, 2019 renewal date.

You assert that although Access Spectrum paid the combined fee for all of these applications (i.e., \$44,365.00), the appropriate aggregate fee should be \$2,390.00. Specifically, you maintain that Access Spectrum "should be required to submit only a single application fee for its Phase II EA/REAG applications, because these 116 applications contain identical requests for relief." You aver that in each of the Phase II EA/REAG applications, Access Spectrum asks the Commission to provide for an extended license term to September 19, 2019, by waiving section 90.765 of the Commission's rules, 47 C.F.R. §90.765, and to eliminate all interim construction requirements prior to that renewal deadline by waiving section 90.767 of the rules, 47 C.F.R. §90.767. You claim that given the commonality of these requests, "the Commission is likely to devote approximately the same administrative effort in its response to all 116 applications as it would in response to a single application to modify a Phase II EA license or Phase II REAG license." You maintain that because the legal and policy issues raised with respect to the Phase I and Phase II nationwide licenses are substantially similar to the legal and policy issues raised with respect to the Phase II geographic licenses, the Commission is likely to consider issues relating to all of the licenses together. You therefore contend that the Commission resources involved in evaluating the request for regulatory changes for two Phase I nationwide, one Phase II nationwide and one Phase II geographic license would be the same as the resources involved in evaluating two Phase I nationwide, one Phase II nationwide, and 116 Phase II geographic licenses. You assert that granting Access's waiver request would be consistent with the Office of Managing Director's grant of DirecTV Enterprises, LLC's request for waiver in Letter from Mark A. Reger, Chief Financial Officer (CFO), Office of Managing Director (OMD), FCC, to Gary Epstein (dated June 15, 2004) (*DirecTV Decision*).<sup>2</sup>

The Commission has discretion to waive filing fees upon a showing of good cause and a finding that the public interest will be served thereby.<sup>3</sup> We construe our waiver authority under section 8 of the Communications Act, 47 U.S.C. §158(d)(2), narrowly and will grant waivers on a case-by-case basis to specific applicants upon a showing of "extraordinary and compelling circumstances."<sup>4</sup> Your request does not meet this

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<sup>2</sup> You also cite Letter from Mark A. Reger, CFO, OMD, FCC, to Stephen R. Bell and Jennifer D. McCarthy, Counsel to OrionNet, Inc. (dated Dec. 11, 2001) (*OrionNet Decision*) and Letter from Mark A. Reger, CFO, OMD, FCC, to Patricia J. Paoletta, Todd M. Stansbury, and Jennifer D. Hindin, Counsel to Digital Broadcasting Applications, Corp. (dated June 24, 2002) (*Digital Decision*).

<sup>3</sup> See 47 U.S.C. §158(d)(2); 47 C.F.R. §1.1117(a); *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 5 FCC Rcd 3558, 3572-73 (1990).

<sup>4</sup> See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 958 (1987) (*Establishment of a Fee Collection Program*); *Sirius Satellite Radio, Inc.*, 18 FCC Rcd 12551 (2003).

stringent standard. In particular, the Commission has stated that there is "no justification in the statute or legislative history for apportioning fees according to the actual work done on any particular application."<sup>5</sup> The Commission has also noted that "processing costs were but one factor in the rough calculus that resulted in the legislated fees."<sup>6</sup> Further, in implementing section 8, we stated that "[i]t is not our intention to make individualized determinations of the 'appropriate fee.' Rather, except in unusual cases in which the public interest requires otherwise, we will levy the fee as determined by Congress."<sup>7</sup> Although you assert that Spectrum Access's applications may raise similar legal and factual issues, this does not obviate the necessity for a full and substantive review by Commission staff of each application. We therefore find that you have failed to establish grounds for a waiver of the applications fees on the basis of alleged low-processing costs. Moreover, your reliance on the *DirecTV*, *OrionNet*, and *Digital Decisions* does not persuade us otherwise because our decision to waive application fees in those cases was expressly based on the "special circumstances" involving processing "large numbers of 'technically identical small antenna earth station facilities.'"<sup>8</sup> We therefore deny your request for refund of the application fees associated with the 115 Phase II EA/REAG modification applications.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,



Mark A. Reger  
Chief Financial Officer

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<sup>5</sup> *Establishment of a Fee Collection Program*, 2 FCC Rcd at 949; see also *Lockheed Martin Corp.* 16 FCC Rcd 12805, 12807 (2001).

<sup>6</sup> *Establishment of a Fee Collection Program*, 2 FCC Rcd at 949.

<sup>7</sup> *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 3 FCC Rcd 5987, 5987 (1988).

<sup>8</sup> *DirecTV Decision* at 2-3, *OrionNet Decision* at 2, and *Digital Decision* at 2 (granting the requests for waiver of the application fees associated with one million, 3,000, and one million earth stations, respectively, and citing *Establishment of a Fee Collection Program* at paras. 245-248, referencing the permissible filing of "blanket" applications for earth stations).

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW

SUITE 802

WASHINGTON, D.C. 20006

STEPHEN J. BERMAN

PHONE (202) 777-7730

PHONE (202) 777-7700

FACSIMILE (202) 777-7763

September 28, 2004

RECEIVED

SEP 28 2004

Federal Communications Commission  
Office of Secretary

00000006-05-02

*Via Hand Delivery*

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street SW  
Washington, D.C. 20554

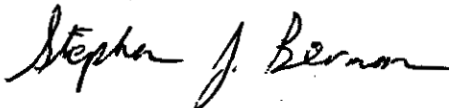
Re: Access 220, LLC - Petition for Waiver of Application Fees

Dear Ms. Dortch:

Submitted herewith is a Petition for Waiver of Application Fees filed on behalf of Access 220, LLC, and its parent, Access Spectrum, LLC, to be referred to the Managing Director in accordance with 47 C.F.R. § 1.1117. As noted in the Petition, Access Spectrum has paid all of the application filing fees that are the subject of this Petition, and requests a refund of fees that may be waived by the Managing Director in response to this request.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Stephen J. Berman

Attachment

cc: Managing Director  
Federal Communications Commission  
445 12th Street SW, Room 1A625  
Washington, DC 20554

DEC 20 2004

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

SEP 28 2004

Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
ACCESS 220, LLC )  
 )  
Petition for Waiver of Application Fees )  
Pursuant to Section 1.1117 )  
of the Commission's Rules )

To: The Managing Director

**PETITION FOR WAIVER OF APPLICATION FEES**

Pursuant to Section 1.1117 of the Commission's rules,<sup>1</sup> Access 220, LLC ("Access 220") and its parent, Access Spectrum, LLC (collectively, "Access Spectrum"), hereby asks that the Office of the Managing Director ("OMD") waive certain application fees associated with their request for comprehensive regulatory relief for band manager operations in the 220 MHz band. This waiver would promote fairness in the Commission's licensing procedures and would be consistent with the public interest.

**I. Access Spectrum's Applications**

Access Spectrum has asked the Commission to establish a regulatory environment at 220 MHz that will support the utilization of 220 MHz spectrum through use by band managers and their customers. Access Spectrum asked the Commission to undertake three actions:

- Extend and harmonize the renewal dates for all of its 220 MHz licenses to a uniform renewal deadline of September 19, 2019;

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<sup>1</sup> 47 C.F.R. § 1.1117.

- Require annual reporting in lieu of interim performance requirements for these 220 MHz licenses, similar to the reporting requirements for band managers at 700 MHz;
- Require that Access Spectrum satisfy the Commission's substantial service test at the new September 2019 renewal date.

Access Spectrum is seeking this new regulatory construct for all of its 220 MHz licenses – 119 licenses in all. In total, Access Spectrum has submitted 123 license applications in order to obtain this comprehensive regulatory relief, and all of these applications are supported by a single document that explains the basis for the regulatory changes requested. Below, Access Spectrum describes these 123 applications, and the fee requirements for each:

- Applications for renewal of two Phase I Nationwide licenses (call signs WPFP444 and WPFR284), with each including a request for waiver of one Commission rule – \$310.00 per application, or \$620.00;
  - Applications for modification of two Phase I Nationwide licenses, with each including a request for waiver of two Commission rules – \$365.00 per application, or \$730.00;
  - Notifications of compliance with ten-year construction milestone for two Phase I Nationwide licenses, with each including a request for waiver of one Commission rule – \$155.00 per notification, or \$310.00;
  - Application for modification of one Phase II Nationwide license (call sign WPOI701), including a request for waiver of two Commission rules – \$365.00;
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- Applications for modification of 106 Phase II economic area ("EA") licenses and 10 Phase II regional economic area grouping ("REAG") licenses, with each including a request for waiver of two Commission rules – \$365.00 per application, or \$42,340.00.

Access Spectrum has already submitted to the Commission the combined fee for all of these filings, for a total payment of \$44,365.00. For the comprehensive regulatory relief that it requests, however, Access Spectrum believes that an appropriate aggregate fee is \$2,390.00. This aggregate payment includes the fees for (i) the applications to

renew Access Spectrum's Phase I Nationwide licenses, (ii) the applications to modify its Phase I Nationwide licenses, (iii) the ten-year milestone notifications for its Phase I Nationwide licenses, (iv) the application to modify its Phase II Nationwide license, and (v) one of the 116 applications to modify its Phase II EA and REAG licenses. As explained below, Access Spectrum believes that it should be required to submit only a single application fee for its Phase II EA/REAG applications, because these 116 applications contain identical requests for relief.

## **II. The Commission's Application Fees and the Standard for Waiver**

The Commission's schedule of application fees is intended to reimburse the government for the work involved in providing certain regulatory services associated with the application filings. The Commission established its fee collection program in 1987<sup>2</sup> to implement provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985.<sup>3</sup> The Budget Act added a new section 8 to the Communications Act of 1934, as amended ("Communications Act"), prescribing charges for certain regulatory actions taken by the Commission.<sup>4</sup> The Commission has noted that "the charges represent a rough approximation of the Commission's actual cost of providing the regulatory actions listed,"<sup>5</sup> and has explained that "the very core of this effort is to reimburse the government – and the general public – for the regulatory services provided to certain

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<sup>2</sup> *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947 (1987) ("Fee Collection Order"), clarified on recon., 3 FCC Rcd 5987 (1988).

<sup>3</sup> Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 5002(e), (f), 100 Stat. 82, 118-21 (1986).

<sup>4</sup> 47 U.S.C. § 158.

<sup>5</sup> *Fee Collection Order*, ¶ 8.

members of the public."<sup>6</sup> Under the Communications Act and the Commission's rules, the Commission may waive its fee requirements where good cause is shown and the public interest would be served.<sup>7</sup>

### **III. The Commission Should Waive Its Fee Requirement for All But One Phase II EA/REAG Modification Application**

As stated above, Access Spectrum requests identical relief in each of its 116 applications to modify its Phase II EA and REAG licenses. In each application, Access Spectrum asks the Commission to provide for an extended license term to September 19, 2019 by waiving Section 90.765,<sup>8</sup> and to eliminate all interim construction requirements prior to that renewal deadline by waiving Section 90.767.<sup>9</sup> Accordingly, each of these 116 applications raises precisely the same legal and policy issues for the Commission.

Given the commonality of these requests, the Commission is likely to devote approximately the same administrative effort in its response to all 116 applications as it would in response to a single application to modify a Phase II EA license or Phase II REAG license. Moreover, because the legal and policy issues raised with respect to the Phase I and Phase II nationwide licenses are substantially similar to the legal and policy issues raised with respect to the Phase II geographic licenses, the Commission is likely to

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~~consider issues relating to all of the licenses together. The Commission resources~~

involved in evaluating the request for regulatory changes for two Phase I nationwide, one Phase II nationwide and one Phase II geographic license would be the same as the resources involved in evaluating two Phase I nationwide, one Phase II nationwide, and

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<sup>6</sup> *Id.* ¶ 7.

<sup>7</sup> 47 U.S.C. § 158(d)(2); 47 C.F.R. § 1.1117(a).

<sup>8</sup> 47 C.F.R. § 90.765.

<sup>9</sup> 47 C.F.R. § 90.767.



116 Phase II geographic licenses. Access Spectrum has expressed its willingness to pay fees for the two Phase I nationwide, one Phase II nationwide, and one Phase II geographic licenses, an amount that is reasonable, and simply requests that it not be required to pay additional fees for additional licenses that raise exactly the same issues. It would be equitable and in the public interest for the Commission to waive its fee requirement for all but one of Access Spectrum's Phase II EA/REAG modification applications. Should OMD grant this waiver request, it must reimburse Access Spectrum for its fee payments for 115 Phase II EA/REAG modification applications, for a total refund of \$41,975.

Such action would be consistent with OMD's grant of a fee waiver request from DirecTV less than four months ago. In that decision, OMD decided that the public interest would be served by permitting a blanket application for one million receive-only dishes, and that it would waive the fees that would have been required for one million separate license requests.<sup>10</sup> OMD based this decision on the fact that these multiple earth stations were technically identical, enabling "Commission staff [to] expend fewer resources and [to] more efficiently process DirecTV's application."<sup>11</sup> Given the identical

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<sup>10</sup> Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, FCC, to Gary M. Epstein, Counsel to DirecTV Enterprises, LLC, Re: Petition for Waiver of Application Fees or Fee Determination Request, at 3 (June 15, 2004) (filed in GN Docket No. 86-285 on July 16, 2004).

<sup>11</sup> *Id.* See also Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, FCC, to Stephen R. Bell and Jennifer D. McCarthy, Counsel to OrionNet, Inc. (Sep. 28, 2001) (filed in GN Docket No. 86-285 on Dec. 11, 2001) (waiving the application fees that would have been required for 3,000 separate receive-only earth stations, and instead using a blanket licensing approach); Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, FCC, to Patricia J. Paoletta, Todd M. Stansbury, and Jennifer D. Hindin, Counsel to Digital Broadcasting Applications Corp. (June 24, 2002) (waiving the application fees that would have been


nature of Access Spectrum's applications to modify its Phase II EA and REAG licenses, this rationale also justifies the fee waivers requested by Access Spectrum in this petition.

#### IV. Conclusion

For the reasons set forth above, good cause exists for the Commission's grant of the requested waiver of the fee requirement for 115 of Access Spectrum's 116 Phase II EA/REAG license modification applications. Accordingly, Access Spectrum respectfully requests that the Commission promptly grant the instant petition and refund to Access Spectrum a total of \$41,975.

Respectfully submitted,

ACCESS 220, LLC

By:   
Ruth Milkman  
Stephen J. Berman  
Lawler, Metzger & Milkman, LLC  
2001 K Street, NW, Suite 802  
Washington, DC 20006  
(202) 777-7700

Its Attorneys

September 28, 2004

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required for one million separate transmit-and-receive earth stations for two-way broadband service, and instead following a blanket licensing approach).